



October 22, 2004

The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

Dear Congressman Conyers:

This is in response to your letter of September 14, 2004, in which you requested that the Office of the Inspector General (OIG) examine whether the Attorney General and the Department of Justice (DOJ) violated the Anti-Lobbying Act (18 U.S.C. § 1913), and the prohibition against using DOJ appropriations "for publicity or propaganda purposes not authorized by Congress" (Consolidated Appropriations Resolution of 2003, Pub. L. No. 108-7, § 601, 117 Stat. 11, 99 (2003)), by engaging in certain activities related to the USA PATRIOT Act (Patriot Act).

Attorneys from the OIG reviewed this matter and for the reasons discussed below do not believe that these activities violated the Anti-Lobbying Act or the appropriation provision. This conclusion is based on a review of the law, the recently issued report by the Government Accountability Office (GAO) concerning the Attorney General's activities (GAO-05-95R, Attorney General's Travel Costs (Oct. 12, 2004)), and other related materials.

Background

According to the GAO, between August 19 and September 9, 2003, the Attorney General and members of his staff visited 16 cities with the purpose of "(1) educat[ing] the public and inform[ing] members of Congress about the provisions of the USA PATRIOT Act and (2) receiv[ing] input and feedback from state and local law enforcement with respect to information sharing among law enforcement agencies and threats to homeland security." This series of trips, during which the Attorney General appeared before audiences primarily composed of law enforcement officials and made remarks in support of the Patriot Act and the DOJ's enforcement of the Act, came to be known as the USA PATRIOT Act Tour (the Tour). The GAO calculated that the DOJ spent \$155,207.51 on the Tour.

Following the Tour, the Attorney General made several additional trips during which he again appeared before audiences primarily composed of law enforcement officials and expressed support for the USA PATRIOT Act. The DOJ referred to these trips, which occurred between September 18 and 25, 2003, as "Life and Liberty Travel." According to the GAO, the DOJ spent \$47,138.15 in connection with these trips.

The OIG reviewed DOJ media advisories concerning both the Tour and Life and Liberty Travel, the prepared texts of five of the Attorney General's speeches, and various media accounts regarding his appearances across the country. Media advisories issued by the Department in connection with the speeches indicate that the Attorney General appeared before audiences composed primarily of law enforcement officials and that the appearances were normally open to members of the media. The texts of the speeches, as well as the press accounts of his remarks, indicate that the Attorney General expressed his support for the Patriot Act and stated his belief that the Act had helped the government bring criminal cases against suspected terrorists. He also referred the audience to a special DOJ website found at www.lifeandliberty.gov for more information regarding the Act and the DOJ's enforcement of its provisions. Although in several of the speeches the Attorney General mentioned legislation proposed by the President, he did not urge the audience to contact their elected representatives in support of either the proposed legislation or the Act itself.

In addition to the Attorney General's efforts, the DOJ requested that the nation's United States Attorneys take action in support of the Patriot Act. According to the GAO, 80 of the 93 United States Attorneys reported conducting such activities in August and September 2003. These activities included in-person, telephone, or written contact with members of Congress; media interviews and appearances; submitting editorials to local newspapers; participation in local debates and forums; and speeches before local groups. Because the DOJ had not specifically tracked the costs associated with these activities, the GAO was unable to assign a cost to them.

Finally, the DOJ created the "life and liberty" website. Information available on the site includes speeches by Administration officials related to the Patriot Act, House and Senate voting records on the Act, statements by members of Congress on the Act, press clippings, and DOJ counterterrorism efforts. As noted above, in several of his speeches the Attorney General referred audiences to the website. According to the GAO report, the cost associated with creating and maintaining the website was \$8,630.44.

The Anti-Lobbying Act

The Anti-Lobbying Act provides that "[n]o part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose . . . any legislation or appropriation by Congress" 18 U.S.C. § 1913. Both the DOJ's Office of Legal Counsel (OLC) and the GAO have issued opinions on the meaning of the Act.

The OLC consistently has interpreted the Anti-Lobbying Act narrowly, finding that it prohibits only "substantial 'grass roots' lobbying campaigns of telegrams, letters, and other private forms of communication designed to encourage members of the public to pressure Members of Congress to support Administration or Department legislative or appropriations proposals." Memorandum for Attorney General Dick Thornburgh from William P. Barr, Assistant Attorney General, Office of Legal Counsel (September 28, 1989), 13 Op. O.L.C. 300, 365 (Barr Opinion); see also Memorandum for the Attorney General and the Deputy Attorney General from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, April 14, 1995 (Dellinger Memorandum) (government employees may not "engage in substantial 'grass roots' lobbying campaigns of telegrams, letters, and other private forms of communication expressly asking recipients to contact Members of Congress, in support of or opposition to legislation."). OLC defined grass roots lobbying to exclude "communication with the public through public speeches, appearances, and writings." Dellinger Memorandum. In addition, OLC has noted that reading the Anti-Lobbying Act more broadly would raise serious questions as to its constitutionality.

In contrast, OLC has held that the Anti-Lobbying Act does not prohibit:

- direct communications between Department of Justice officials and members of Congress and their staffs;
- public speeches, appearances, and writings;
- private communications designed to inform the public about Administration positions or to promote those positions, as long as there is no significant expenditure (defined as in excess of \$50,000) of appropriated funds; or

- lobbying activities by executive branch employees whose official duties historically have included lobbying functions, including Presidential appointees within their areas of responsibility, and persons to whom such officials have traditionally assigned such responsibilities.

Barr Opinion; Dellinger Memorandum.

The GAO has followed the DOJ's narrow reading of the Anti-Lobbying Act and repeatedly has held that it does not prohibit "officials of the executive branch [from] express[ing] their views regarding the merits or deficiencies of legislation." See Comptroller General opinion B-229257 (June 10, 1988). Thus, the GAO rejected a claim that the Department of Housing and Urban Development (HUD) violated the Act by mailing to its "main constituencies"¹ a letter critical of congressionally-proposed cuts to HUD programs because the letter did not request its recipients contact their elected representatives and because it was signed by a Presidential appointee. B-284226.2 (August 17, 2000). See also B-270875 (July 5, 1996) (rejecting a challenge to communications by agency heads critical of legislation but not urging contact with elected representatives).

The Appropriations Provision

Although OLC has not published a legal analysis of appropriations provisions prohibiting publicity or propaganda activities not authorized by Congress, the GAO has discussed such laws in numerous legal opinions.² In these opinions, the GAO has interpreted the provisions to prohibit the following types of agency communications:

Self-aggrandizement or puffery. Under GAO precedent, communications "tending to emphasize the importance of the agency or activity in question" are prohibited. B-284226.2. Thus, an agency may not expend funds to issue a press release that attempts to persuade the public as to its own importance. The GAO has explicitly held, however, that agency statements informing the public of its position on pending legislation,

¹ These included grantees, public interest groups, churches, mayors, National Urban League affiliates, tribal leaders, public housing agencies, various business groups, historically black colleges, academics, and newspapers and news organizations.

² The OLC has summarized the GAO's interpretation of these provisions: "Government employees also MAY NOT (1) provide administrative support for the lobbying activities of private organizations, (2) prepare editorials or other communications that will be disseminated without an accurate disclosure of the government's role in their origin, and (3) appeal to members of the public to contact their elected representatives in support of or opposition to proposals before Congress." Dellinger Memorandum.

like the HUD brochure discussed above, do not constitute improper puffery. Id.

Covert Propaganda. The GAO has held that communications that are misleading as to their origin are prohibited. For example, the GAO found the State Department violated its appropriations provision when it hired consultants to prepare newspaper articles and opinion editorial pieces in support of the Reagan Administration's Central America policy that were published as the positions of persons not associated with the government. 66 Comp. Gen. 707 (1987). In contrast, material distributed to the press by the Federal Trade Commission (FTC) critical of the U.S. Postal Service but that clearly identified the FTC as the source did not violate the provision. B-229257 (June 10, 1988).

Partisan Purposes. The GAO has stated that appropriated funds may not be used for communications made for purely partisan purposes. The GAO has acknowledged, however, the difficulty of distinguishing between legitimate dissemination of information in explanation and defense of policies and activities of a purely political nature. See B-302504 (March 10, 2004). Accordingly, the GAO has stated that "only if an activity is completely devoid of any connection with official functions" will it violate the provision. B-302992 (Sept. 10, 2004). Thus, for example, the GAO found that statements by the Deputy Director of the Office of National Drug Control Policy (ONDCP) critical of efforts to legalize the sale of marijuana could not be characterized as purely partisan given the ONDCP's statutory responsibilities. B-301022 (March 10, 2004).

Urging Contact with Elected Representatives. The GAO has interpreted these provisions to prohibit "expenditures involving direct appeals addressed to the public suggesting that they contact Members of Congress and indicate their support or opposition to pending legislation, i.e., appeals to members of the public for them in turn to urge their representatives to vote in a particular manner. . . ." B-178648 (Sept. 21, 1973). In contrast, statements by government officials discussing pending legislation and the Administration's views concerning it, but not containing direct appeals to members of public to contact their representatives, are legitimate.

In sum, the GAO has interpreted "publicity and propaganda" provisions to prohibit a relatively narrow category of agency communication. Under GAO precedent, such provisions do not prevent "public officials [from] report[ing] on the activities of their agencies, . . . expound[ing] to the public the policies of those agencies, and of the administration of which they are members, and . . . offer[ing] rebuttal to attacks on those policies." B-178648. Nor are agencies prohibited from expressing their views on legislation. Indeed, as the GAO has stated, interpreting the provisions to "strictly prohibit[] expenditures of

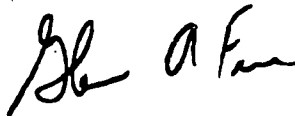
appropriated funds for dissemination of views on pending legislation would consequently preclude any comment by officials on administration or agency policy, a result which . . . we do not believe was intended." Id.

Conclusion

Based on these authorities, we do not believe that the DOJ's Patriot Act activities described above violated either the Anti-Lobbying Act or the provision prohibiting the expenditure of DOJ funds for publicity or propaganda. First, both the Attorney General and the United States Attorneys are Presidential appointees, against whom the prohibitions of the Anti-Lobbying Act do not apply. Second, nothing in the Anti-Lobbying Act or the appropriations provision prevents United States Attorneys from meeting directly with members of Congress and their staffs regarding a matter of official DOJ policy. Third, neither the Anti-Lobbying Act nor the appropriations provision prohibited the Attorney General and the United States Attorneys from making public speeches conveying the DOJ's view regarding the merits of the Patriot Act and discussing the DOJ's use of the law's provisions. Fourth, the DOJ's communications regarding its support of the Patriot Act were not made in a covert manner. In addition, given the DOJ's responsibility to enforce the criminal laws, we do not believe they could be considered "purely partisan." Finally, we found no indication in the material we reviewed, including texts of five of the Attorney General's speeches and news accounts describing eight of his appearances, that he urged his audiences to contact their elected representatives.

Please contact us if you have questions about this letter or any other issue.

Sincerely,



Glenn A. Fine
Inspector General

cc: The Honorable F. James Sensenbrenner
Chairman, Committee on the Judiciary
U.S. House of Representatives

William E. Moschella
Assistant Attorney General
Office of Legislative Affairs